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ALEXANDER L. STEVAS,

No. 82-398

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

against

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

On Appeal from the Court of Appeals of New York

MOTION TO DISMISS OR AFFIRM

ROBERT ABRAMS
Attorney General of the
State of New York
Appellee Pro Se
Two World Trade Center
New York, New York 10047
(212) 488-3443

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JOHN M. FARRAR
Assistant Attorney General

Of Counsel

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No. 82-290

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

against

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

On Appeal from the Court of Appeals of New York

MOTION TO DISMISS OR AFFIRM

Appellee ROBERT ABRAMS, Attorney General of the State of New York, moves under Rule 16.1(a), (b) and (c) of the Rules of the Supreme Court to dismiss the appeal of appellant, the Equitable Life Assurance Society of the United States ("Equitable") from the judgment of the New York Court of Appeals which held § 720.3 of the Real Property Tax Law of the State of New York (L. 1981 Ch. 1057 § 7) not to violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution, nor, on its face, to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, appellee Abrams moves to affirm that judgment.

The statute, real Property Tax Law (R.P.T.L.) § 720.3, upheld below to the extent indicated and held prospectively applicable to appellant on remand for trial in appellant's tax certiorari proceeding on the theory of inequality of assessment, limits evidence of the ratio of assessed to full value of real property in the City of New York to that obtained from appraised sample parcels and actual sales. Use of the state equalization ratio, compiled by the New York State Board of Equilization and Assessment, as such proof, is foreclosed (A 5).*

The grounds for the instant application are that jurisdiction under 28 U.S.C. § 1257(2) is improperly invoked as the judgment below is neither final nor presents a substantial federal question; or that if jurisdiction is properly invoked it is manifest that the precedents of this Court on which the decision below rests are so well established as to render further argument unnecessary.

Statement of the Case

A. Background

Appellant has challenged its local real property assessment on the ground of inequality. A challenge to an assessment of a local assessing district in the State of New York

* Parenthesized page references preceded by an "A" refer to appellant's appendix; those preceded by a "JS" refer to appellant's jurisdictional statement.

on the ground of inequality presupposes that real property in the assessing district is assessed at less than full value.* The petitioner in an inequality proceeding argues that his parcel has been assessed at a higher "ratio" (*i.e.*, fraction) of full value than the other property in the district with which he seeks to compare it and that the assessment should be accordingly reduced and his payment of local real property taxes proportionally refunded. Such a tax review proceeding is bifurcated, the first part establishing the applicable ratio of assessment and the second determining the fair market value of the property in question against which the ratio is applied to determine whether the assessment is unequal. *Matter of Slewett and Farber* v. *Board of Assessors, Nassau County*, 54 N.Y.2d 547, 555, 446 N.Y.S. 2d 241, 243, 430 N.E.2d 1294, 1296 (1982).

The ratio or fraction of "other" parcels, with which the fractional assessment of the parcel under judicial review in an inequality proceeding is to be compared under the Real Property Tax Law was construed as an average ratio encompassing all types of property in the district, not the class of property to which the subject parcel belonged. However, unlike the Real Property Tax Law, the New York City Administrative Code, § 166-1.0.b.3, additionally permits inequality comparison with "like character" properties in the same ward or section. This was the type of inequality review sought by appellant below (*e.g.*, Haims affidavit, A 48). Moreover, the City of New York has also

* See New York Real Property Tax Law § 720.1; New York City Administrative Code § 166-1.0.b.3. Thus, the question of illegality of the practice of fractional assessment is not relevant in a challenge to an assessment on the ground of inequality (A 2-3). Moreover, Real Property Tax Law (R.P.T.L.) § 305.2 now permits fractional assessment (A 7).

assessed "income" property at a higher fraction or ratio than residential property (A 25) for the reason that the income owner may pass along the cost of these taxes while the residential owner cannot.

B. The State Equalization Ratio as Evidence

Prior to 1961, the state equalization ratio (state rate), a "generic" or "whole roll" ratio based upon a sampling of all types of property in a taxing district, was held to be completely inadmissible as evidence of ratio under Real Property Tax Law § 720.3 and its predecessors; the only admissible evidence of ratio being appraised selected parcels supplemented by parcels sold within the district during the period under review. In 1961, the Legislature amended § 720.3 to permit, additionally, proof of actual sales and the state rate (L. 1961 Ch. 942). The 1961 statute was construed as not permitting the state rate as the sole proof of ratio. Then, in 1969, the Legislature amended § 720.3 again (L. 1969 Ch. 302), to permit the use of the state rate as the sole basis for determining the ratio of assessed to full value of property in the district under the Real Property Tax Law; subject, however, to demonstration by petitioner that its use was justified and to challenge by the municipality as to its appropriateness to the parcel under review, the roll under review or the type of property under review. *Matter of Ed Guth Realty, Inc.* v. *Gingold*, 34 N.Y.2d 440, 447-449, 358 N.Y.S.2d 367, 371-372 (1974).

In 1977 the New York Court of Appeals *sub nom. Pierre Pellaton Apts. Inc.* v. *Board of Assessors, Nassau County*, 43 N.Y.2d 769, 401 N.Y.S.2d 1013, 372 N.E.2d 801, affirmed the holding of *860 Executive Towers, Inc.* v. *Board of*

Assessors, Nassau County, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2nd Dept. 1976), that, *inter alia*, the reference in the *Guth* case to the possibility of showing the inappropriateness of the state rate to a particular type of property was largely illusory. Further, the state rate for the year and district in question, once having been litigated, was entitled to collateral estoppel effect.

In consequence of the foregoing, "income" property owners such as appellant, who had failed to prosecute their petitions for review for years as far back as 1969, subsequently consolidated these unprosecuted accumulated petitioners and noticed them for trial on the ground of inequality, flooding the courts with certiorari litigation in which they claimed a virtually conclusive presumption of inequality by applying the "generic" state rate to their income property, which had been assessed as a class by many localities at a higher fraction. Moreover, the automatic application of the state rate, once litigated, threatened units such as Nassau County and the City of New York (if the R.P.T.L. was applicable) with sudden exposure to the refund of billions of dollars in real property tax refunds,* and a concomitant tax shift imposing an additional burden on residential owners therein.

C. Legislation and Litigation

In 1978 the Legislature enacted a statute (L. 1978 Ch. 476; R.P.T.L. § 307) which was construed to retroactively mandate the pleading of inequality by class, and, as such,

* In the City of New York this exposure was reported at 1.7 to 2.7 billion dollars.

was found to be illegal. See *Matter of Slewett and Farber v. Board of Assessors, Nassau County*, 97 Misc. 2d 637, 412 N.Y.S.2d 292 (Sup. Ct. Nassau Co. 1978).

On May 24, 1979, while appeal from said decision was pending, L. 1979 Ch. 126 and 127 became effective. The 1979 enactment, in pertinent part, amended R.P.T.L. § 720.3 by eliminating the state rate as evidence of ratio in all proceedings then pending and not finally determined. Five months thereafter, on November 2, 1979, Equitable filed its notice of intent to proceed to trial with the City of New York on the ground of inequality as to its Madison Avenue property; and nine months thereafter, on February 27, 1980, it filed a similar notice as to its Fifth Avenue property.

On June 12, 1980, Supreme Court, Special Term, New York County (*Mangan, J.*) rendered its opinion in a case involving similar issues to Equitable's, *Colt Industries, Inc. v. The Tax Commission of the City of New York* (A 20-31). Petitioners there had moved to dismiss the City's defense based on the 1979 enactment barring use of the state rate as evidence of ratio. Noting the unique nature of the City of New York and its mix of real property (A 29-30), the holding was that § 166-1.0.b.3 of the City Administrative Code authorized classified assessment (A 2), thereby rendering irrelevant the use of the generic state rate as proof of ratio (A 25-29); but that in any event petitioner had no vested right to the rule of evidence altered by the 1979 amendment (A 30).

On August 7, 1980, the same court denied Equitable's similar application (A 12-19).

While the Equitable appeal was pending, the Appellate Division, Second Department, on January 21, 1981, rendered an opinion in the *Slewett and Farber* case, affirming that the 1978 pleading statute was in pertinent part unconstitutional, but not reaching the question of the constitutionality of the 1979 amendment to § 720.3 (78 A.D.2d 403, 435 N.Y.S.2d 313, 2nd Dept. 1981).

On reargument however, the Appellate Division, Second Department (80 A.D.2d 186, 438 N.Y.S.2d 544; April 8, 1981), upheld the constitutionality of the 1979 amendment to § 720.3 as a procedural statute designed to control evidence, but held it not applicable to petitioner there, who had obtained an adjudication of ratio prior to its enactment (80 A.D.2d 217, 438 N.Y.S.2d 566).

On May 12, 1981, the Appellate Division, First Department, in the jointly argued appeals of Equitable and Colt Industries, affirmed, on the opinion below, Special Term's construction of the New York City Administrative Code provision as authorizing classified assessment; one Justice partially dissenting (81 A.D.2d 777, A 50-57, A 10-11).

On October 30, 1981, while appeals in all these cases were pending in the New York Court of Appeals, and after briefing on the 1978 and 1979 legislation had been completed, both statutes expired. On December 3, 1981, the Legislature overrode the Governor's veto of new comprehensive legislation, enacting L. 1981 Ch. 1057. This enactment included a new Real Property Tax Law § 720.3, limiting the use of the state rate as evidence of ratio to all assessing units other than Special Assessing Units. It had the effect of

foreclosing the use of the state rate as evidence of ratio in inequality proceedings in New York City and Nassau County (A 5).

D. The Opinion Below

In its opinion, rendered January 7, 1982, after concluding that § 166-1.0 of the Administrative Code was procedural in nature and did not authorize classified assessments in the City of New York (A 2), the New York Court of Appeals held:

> "That this section authorizes taxpayers who challenge the assessments of their real property to present proof of inequality based on either or both of two theories—that the particular assessment 'has been made at a higher proportionate valuation than the assessment of other real property of like character in the same ward or section', or that the assessment 'has been made at a higher proportionate valuation than the assessment of * * * other real property on the assessment rolls of the city for the same year.' Thus, proof may be introduced to establish inequality with respect to property of similar character in the same ward or section or with respect to the citywide assessment rolls. In continuing this proceeding, petitioner should be allowed to introduce either or both types of proof." (A 3).

On the question of evidence, the Court held the 1981 law prospectively applicable to the instant proceeding "in which no evidentiary hearings have yet been held or interlocutory determinations made . . ." (A 5), and directed that

> "Accordingly, when such evidentiary hearings are held in these cases on remittal following this appeal,

among other considerations to be taken into account in rulings with respect to the admissibility of evidence will be the provisions of new subdivision 3 of section 720." (A 5).

Citing this Court's decision in *Salsburg* v. *Maryland*, 346 U.S. 545 (1954), and quoting directly from this Court's opinion in *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879), the Court below rejected appellant's Equal Protection challenge (A 6), concluding that:

> "The Legislature had a rational basis for designating the City of New York and Nassau County special assessing units and restricting the admissibility of State equalization rates in such units. This legislation which was designed to overrule this court's decision in *Matter of Hellerstein* v. *Assessor of Town of Islip*, 37 N.Y.2d 1, 371 N.Y.S.2d 388, 332 N.E. 2d 279, which required full value assessment for all property, recognized the unique nature of those communities with their high density of population and diversity of property." (A 7).

As to appellant's allegations that the cost of proving ratio by the remaining methods of proof amounted to deprivation of any evidence of ratio in violation of the Due Process Clause, the Court of Appeals held:

> "... it cannot be said that this legislation has been shown, on its face, to constitute such a deprivation. The fact that these procedures are admittedly more cumbersome and expensive does not require a holding that there is a deprivation of due process. (Gibbs v. Zimmerman, 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342.) The Legislature, in its wisdom, has seen fit to restrict the admissible proof to selected parcels and sales data and there are no grounds for this court, by judicial fiat,

to authorize additional proof. The Legislature did no more than restore, in special assessing units, the status quo ante chapter 942 of the Laws of 1961 which first authorized the admission of State equalization rates." (A 8).

After the court below denied Equitable's motion to reargue (A 32), Equitable appealed to this Court, claiming that the denial to it of the use of the state rate as evidence of ratio on remand of the case amounts to a denial of Due Process and Equal Protection of the law.

ARGUMENT

The judgment below is not final; nor does the instant case present an exception to the finality rule. No substantial federal question is presented.

A. The judgment below is not final.

As evidenced by the record (Haims affidavit; A 48-49), the original basis of Equitable's challenge to the local assessments in question was comparison with like character properties in the same ward or section. See Administrative Code § 166-1.0.b.3. Whether or not the like character comparison was the result of Special Term's prior holding in *Colt* (JS 14, A 26-27), it cannot be disputed that the New York Court of Appeals actually permitted the expansion of the scope of appellant's remedy on remand beyond that which appellant had specifically asserted at the outset of this litigation when it held that:

> "... proof may be introduced to establish inequality with respect to property of similar character in the same ward or section or with respect to the city-wide

assessment rolls. In continuing this proceeding, petitioner should be allowed to introduce either or both types of proof." (A 3).

Consequently, to assert, as appellants have, that the Court of Appeals' construction of Administrative Code § 166-1.0.b.3 is irrelevant to considerations of finality relating to this appeal (JS 9), and that the instant challenge to that Court's constitutional findings is supported by this record at this time, defies credulity.

The judgment below is not final. There has been no evidentiary hearing on, or adjudication of, ratio (A 5). Even if there had been, the analogy to the line of condemnation and related cases involving interlocutory determinations in which this Court refused jurisdiction is inescapable. See *Grays Harbor Logging Company* v. *Coates-Fordney Logging Company*, 243 U.S. 251 (1917); *Catlin* v. *United States*, 324 U.S. 215 (1945) (orders of condemnation not final—further federal questions may arise on remand); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62 (1948) (state commission order to connect to another pipeline and take gas on terms to be agreed upon or fixed by Commission, not final); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1980) (state court determined monetary compensation not appropriate remedy and remanded for hearing on whether taking occurred and what remedies applicable in that event, not final). Compare, *Minnick* v. *California Department of Corrections*, —— U.S. ——, 101 S.Ct. 2211 (1981) (finality found lacking in discrimination case because ambiguity required review by state courts in light of recent case law).

Moreover, the Court of Appeals' holding below on the 'cost of proof' issue was that the new § 720.3 had not been demonstrated "on its face" to constitute a deprivation of Due Process (A 8). Nothing was said concerning the statute's constitutionality *as applied.** Consequently, a constitutional issue remains which has not been finally determined in state courts and might require review by this Court at a later date, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975); *Grays Harbor Logging Company* v. *Coats-Fordney Logging Company, supra; San Diego Gas & Electric Co.* v. *City of San Diego, supra.*

Clearly, reversal of the state court on the federal issues decided in the circumstances at bar would *not* be preclusive of any further litigation on the relevant cause of action and *would* merely control the nature and character of, and determine the admissibility of, evidence in the state court proceedings still to come. *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. 482-483.

In an attempt to persuade this Court to forego consideration of the serious jurisdictional issues related to finality presented by the record, appellant here asserts that "as a practical matter" other methods of proof of ratio are prohibitively expensive (JS 11-12). However, surveys of actual sales have been used as the sole proof of ratio without challenge to their cost, and state courts have held this method of proof of ratio to be more probative than the state rate. See *Matter of Swanz* v. *Brant,* 52 A.D.2d 1071, 384 N.Y.S.2d 331 (4th Dept. 1976); *Matter of Standard*

* The decision of *Canigiani* v. *Board of Assessors, Nassau County* (Sup. Ct. Nassau Co., Slip op. June 29, 1981; A 58-69) is presently pending on appeal to the Appellate Division, Second Department.

Brands, Inc. v. *Walsh*, 92 M.2d 903, 402 N.Y.S.2d 264 (Sup. Ct. Westch. Co., 1977). The methods of proof and theories to be employed—indeed, even the decision to initiate certiorari litigation—by "income" property owners, would therefore appear to be a matter of business judgment rather than of constitutional law.

Surely, appellant cannot bootstrap itself into this Court's jurisdiction at this time by such an unsupported unilateral denunciation and renunciation of alternate theories of inequality and methods of proof of ratio made available under the statute in question, which, in part, appellant has heretofore espoused. *Minnick* v. *California Department of Corrections, supra*, —— U.S. ——, 101 S.Ct. 2211, 2219-2220 (1981). Compare, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

Moreover, Real Property Tax Law § 716 provides for reimbursement of expenses incurred in proving ratio. Real Property Tax Law § 716 has never been directly placed in issue in any of the proceedings below.

As this Court stated in *Republic Gas Co.* v. *Oklahoma, supra*:

> "The incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention. But even if the Commission's order were construed to require Republic to take and dispose of Peerless' gas immediately—and we are not so advised by the State court—there is no ground for assuming that any loss that Republic might incur could not be recovered should the completed direction of the Oklahoma Commission, on af-

firmance by that State's Supreme Court, ultimately be found to be unconstitutional. Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment. Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction." (334 U.S. 70-71; citations omitted).

The instant record, we submit, hardly supports the examination by this Court at this time of the decision below, relying as it does on precedent established by this Court over 100 years ago.

B. No important considerations of federal policy warranting the treatment of the judgment as final are presented.

None of the exceptions to the finality rule set forth in *Cox Broadcasting Co.* v. *Cohn, supra,* has been demonstrated to be applicable to the instant appeal. The case at bar does not involve the question of a state court exceeding its jurisdiction where it is preempted by a federal law or policy. See *Fisher* v. *District Court of the Sixteenth Judicial District of Montana,* 424 U.S. 382 (1976) (conflict of State court with Indian Tribal court); *Pope* v. *Atlantic Coast Line Railroad Co.,* 345 U.S. 379 (1953) (injunction by court of one state of F.E.L.A. action in another state); *Central Vermont Railway Company* v. *White,* 238 U.S. 513 (1915) (application of state statute of limitation in F.E.L.A. case).

It is not a case where the constitutional issue could not be preserved on remand, *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.*, 414 U.S. 156 (1973), or where no federal question could be raised in a subsequent proceeding, *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1944), or where only ministerial or *pro forma* proceedings remain to be completed, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 308 (1961).

Rather, it is a case where a state court has construed a state statute relating to a matter of state and local concern as procedural, and applied it prospectively to a stage of a pending proceeding which has not been reached; a construction usually binding on this Court, *Greenough* v. *Tax Assessors of Newport*, 331 U.S. 486, 489 (1947); *Central Vermont Railway Co.* v. *White*, *supra*, 238 U.S. 507, 513.

Consequently, the instant circumstances do not warrant making an exception to the finality rule.

C. No substantial federal question is presented.

What Equitable here seeks is to have this Court hold as substantive a state statute which the highest state court has held to be procedural.

However, even in the case of a substantive statute ratifying assertedly illegal collections of sales taxes, thereby avoiding the severe economic impact of the necessity of refunding millions of dollars in past taxes paid, *State ex rel. Van Emmerick* v. *Janklow*, 300 N.W. 2d 700 (Sup. Ct. S.D. 1981), this Court has dismissed an appeal from the highest state court's ruling upholding constitutionality for

lack of a substantial federal question, *Van Emmerick* v. *Janklow*, —— U.S. ——, 102 S.Ct. 986 (1982).*

Moreover, legislative alterations of procedural rules, even alterations modifying a remedy, have not been considered as violative of either Equal Protection or Due Process tenets. See *Funkhouser* v. *J.B. Preston Co.*, 290 U.S. 163 (1933).

The Legislature's right to alter a rule of proof without running afoul of the Equal Protection Clause is undisputed, *Louisville and Nashville R.R.* v. *Melton*, 218 U.S. 36 (1910); *Mobile J. & K.C.R.R.* v. *Turnipseed*, 219 U.S. 34 (1910) (abrogation of fellow servant rule as to railroad employees). Nor is there an Equal Protection violation because of differences of treatment in local real property taxation between local districts in the state, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973); *Board of Education, Levittown Union School Free District* v. *Nyquist*, —— N.Y.2d —— (Slip op. No. 317, June 23, 1982); nor for differentiation in procedural rules between different localities, *Salsburg* v. *Maryland*, 346 U.S. 545 (1954); *Missouri* v. *Lewis*, 101 U.S. 22, 31 (1879).

There is no due process violation in legislative limitation of a statutory remedy, *Crane* v. *Hahlo*, 258 U.S. 142 (1922) (limitation of judicial review of condemnation award to questions of jurisdiction, fraud and willful mis-

* If, as appellant asserts, the holding in *Matter of J.A. Green Construction Corp.* v. *Finance Administrator of the City of New York*, 56 N.Y.2d 369 (1982) creates an ambiguity with regard to the Court of Appeals' interpretation of the statute in question, this is all the more reason for dismissal of the instant appeal, *Minnick* v. *California Department of Corrections, supra; San Diego Gas & Electric Co.* v. *City of San Diego, supra.*

conduct of local officials). Compare *McGee* v. *International Life Insurance Co.*, 355 U.S. 220 (1957) (long arm statute did not violate due proces).

In short, the Court below properly held that there is no property right in the form of the remedy as long as some effective means of redress remains available, *Gibbs* v. *Zimmerman*, 290 U.S. 326 (1933), and that temporary out of pocket expense is not a proper basis for a due process challenge that access to the courts or a remedy has been denied. *Republic Natural Gas Co.* v. *Oklahoma, supra*, 334 U.S. 70-71; R.P.T.L. § 716.

Conclusion

Upon the foregoing, this appeal should be dismissed, or the judgment below affirmed.

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Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Appellee Pro Se

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

JOHN M. FABRAR
Assistant Attorney General

Of Counsel